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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 243

MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INCORPORATED,

Petitioner,

v.

DISTRICT OF COLUMBIA

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.
GLENN SIMMON,
Assistant Corporation Counsel, D. C.,
Attorneys for the Respondent.

CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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OPINIONS BELOW

The opinion of the Board of Tax Appeals for the District of Columbia (R. 45-72) is not reported. The opinion of the United States Court of Appeals for the District of Columbia is reported at 119 F. (2d) 787.

STATEMENT OF THE CASE

The facts are correctly and concisely stated in the opinion of the Court of Appeals (R. 157, et seq.) and are correctly stated in greater detail by the Board of Tax Appeals on pages 45-58 of the record.

SUMMARY OF ARGUMENT

The questions decided by the United States Court of Appeals for the District of Columbia in this case are not of general importance. The Court held (a) the petitioner to be the owner of certain intangible personal property taxable in the District of Columbia, and (b) the petitioner to be the owner of certain milk and cream sold in the District of Columbia, and therefore required to pay the District of Columbia business privilege tax measured upon the receipts derived from such sales. Liability for the taxes depends in great degree upon ownership of the property, which ownership necessarily must be determined by the contracts between the Association and the producers establishing the relation and method of dealing employed by these particular parties. The facts establishing the relation between this Association and the producers certainly have no bearing upon the ownership of property held by other taxpayers within or without the District of Columbia. The effect and importance of the decision of the Court of Appeals is limited to this petitioner.

2. The statutes here involved have been repealed, and questions arising thereunder are not of sufficient public importance to require the consideration of this Court.

3. The decision of the Court of Appeals is correct. During the tax years involved, the petitioner's sole place of business and "commercial domicile" was in the District of Columbia. The petitioner was clearly the owner of the intangibles in question, which had a taxable situs in the District. Petitioner was likewise the owner of milk and cream which it sold to local dairies, and was liable for a business privilege tax measured upon the gross receipts derived from such sales.

ARGUMENT

I

The questions decided by the Court of Appeals in this case are not of general importance.

The tax statutes here involved were confined in their operation to the District of Columbia. This Court ordinarily will not review cases arising under such statutes. *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285.

Jurisdiction to bring up cases by certiorari from the United States Court of Appeals for the District of Columbia was given for the purpose of having questions of general importance decided by this Court when such decisions are in the public interest. [1] The question of this petitioner's tax liability to the District of Columbia is not one of general importance. While the petitioner suggests that the questions decided in this case are of importance to other marketing associations, it is plain from an examination of the record, petition, and supporting brief that the petitioner is merely seeking another hearing on the merits of the case. This Court will not grant a writ of certiorari merely to review the evidence or inferences drawn from it. *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178.

The Court of Appeals determined in this case that the petitioner was the owner of certain intangible personal property and that such property had a taxable situs in the District of Columbia. The Court also held that the petitioner was the owner of certain milk and cream which it sold in the District of Columbia during the calendar year 1936 and was, therefore, subject to a business privilege tax measured upon

[1] See:
Magnum Co. v. *Coty*, 262 U.S. 159, 163;
Layne & Co. v. *Western Well Works*, 261 U.S. 387, 392;
Southern Power Co. v. *Pub. Serv. Co.*, 263 U.S. 508.

the gross receipts derived from such sales. These questions of ownership necessarily were determined upon the facts peculiar to this case. Certainly the contracts between this Association and the producers and the facts regarding its method of doing business in the District of Columbia cannot determine the ownership of property held by other cooperative associations. Neither the petition nor the supporting brief contain any support for the suggestion that the decision of the Court of Appeals is important to other associations. The *amicus curiae* brief filed herein likewise makes no attempt to draw an analogy between the petitioner's contracts and the manner in which it conducts its business and the contracts and manner of doing business employed by other associations, nor does it point out why or how any other cooperative is affected by the decision of the Court of Appeals in this case.

II

The statutes here involved have been repealed and the questions arising thereunder are not of sufficient public importance to require the consideration of this Court.

The District of Columbia statute imposing taxes upon intangible personal property was repealed by Section 1, Title IV, District of Columbia Revenue Act of 1939 (53 Stat. 1107), D. C. Code, 1929, Title 20, Part 5, Page 161, Supplement V.

Title VI of the District of Columbia Revenue Act of 1937 imposed a business privilege tax for the fiscal year 1937-1938 (50 Stat. 690), Sec. 970, Title 20, D. C. Code, 1929, Supplement III. The Act of May 16, 1938, to amend the District of Columbia Revenue Act of 1937, reenacted Title VI, and specifically provided in Section 16 thereof that the title should expire June 30, 1939 (52 Stat. 369), Sec. 970o., Title 20, D. C. Code, 1929, Supplement V.

The questions arising under acts which have been repealed are not of sufficient public importance to require the consider-

ation of this Court. *District of Columbia* v. *Sweeney*, 310 U.S. 631.

III

The decision of the Court below is correct.

The decision of the Court of Appeals holds that petitioner was the owner on the tax dates involved of certain stocks, bonds, cash, and accounts receivable; that it had a "commercial domicile" in the District of Columbia and is subject to the District tax upon such intangibles; that the petitioner was the owner of milk and cream sold in the District of Columbia during the calendar year 1936, and it is subject to a tax measured upon the gross receipts derived from such sales; and that assessments of such taxes were validly made against the petitioner.

Petitioner's principal objection to the tax is based upon the contention that the relation between the Association and the producers is that of principal and agent, and, therefore, the property involved was owned by the individual members of the Association. The questions relating to petitioner's liability for each of the taxes and the validity of assessments thereof are hereafter discussed separately.

(a) Intangible Personal Property Taxes

Generally

Section 754, Title 20, D. C. Code, 1929 (39 Stat. 717) was in effect during the periods here involved, and provides, in part, as follows:

> "The moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the stock of banks and other corporations within the Dis-

trict of Columbia the taxation of which banks and corporations is herein provided for) of any person, firm, association, or corporation resident or *engaged in business* within said District shall be scheduled and appraised in the manner provided by section 753 of this title for listing and appraisal of tangible personal property and assessed at their fair cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District not less than five-tenths of 1 per centum of the value thereof: * * *." (Emphasis supplied.)

On the tax dates here involved, the petitioner had its principal and, indeed, its only real office at 1731 I Street, N.W., in the District of Columbia. All books and records of the Association were kept at such office; there its officers and employees had their offices; there the officers and directors met and formulated the policies of the Association; checks were drawn in payment of milk produced by its members and for dividends paid to its members; in fact, all business of the Association was transacted in or from such office (R. 99). One directors' meeting was held in Maryland each year in order to comply with the laws of that State (R. 99). The Association also maintained an office in Hyattsville, Maryland, required under the Maryland statute, at which place no business was transacted (R. 99). On June 25, 1938, petitioner moved its principal office and records to Maryland but continued, and still continues, to carry on its principal business functions, namely, the sale of milk and cream, within the District. In addition, petitioner maintains storage space in the District for the storage of cream (R. 107). There would seem to be no question that the petitioner was "engaged in business" in the District on July 1, 1935, July 1, 1936, and July 1, 1937, the tax dates here involved, as contemplated by the intangible personal property tax law, and is subject to taxation upon

all its intangible personal property having a taxable situs therein.

Hazen v. *National Rifle Ass'n of America*, 69 App. D. C. 339, 101 F. (2d) 432;

Stanford University Bookstore v. *Helvering*, 65 App. D. C. 365, 83 F. (2d) 710;

District Grocery Stores, Inc., v. *District of Columbia*, 24 F. Supp. 447.

The Association established its "commercial domicile" in the District of Columbia and it became liable for taxes to the District as if it had been incorporated or domiciled therein.

Wheeling Steel Corp. v. *Fox*, 298 U.S. 193, 80 L. Ed. 1143.

See also:

Hazen v. *National Rifle Ass'n of America*, *supra*.

Petitioner contends that the intangible personal property held by the Association on the tax dates involved was not the property of the Association but that such property belonged to certain of its members and was held and invested by the Association as agent for such individual members, and petitioner argues that such property is not subject to taxation by the District for the reason that the individual member owners thereof are domiciled without the District. The integrity of petitioner's argument in this respect is somewhat weakened by the fact that for each of the years involved the petitioner reported a portion of such property to the Assessor, D. C., and paid, without protest, a tax thereon (R. 7). No contention is made that the intangibles of the Association have a taxable situs in any jurisdiction other than the District.

The assets of the Association were acquired in several ways:

(1) The principal income of the Association results from the deduction or retention of a portion of the amount received for the milk or cream produced and delivered by its members (R. 106). The Association agrees to sell or dispose of all the milk and cream delivered by the individual members and is

authorized to deduct from the proceeds of such sales an amount "which may be necessary to meet its proper proportion of the expenses incurred or to be incurred by the Association, together with such other sums as may be necessary to cover operating expenses, interest, overhead, depreciation, all obligations or debts of the Association lawfully incurred, as well as to create reasonable reserves or other funds reasonably estimated as essential or probable to be incurred by the Association pursuant to its constitution and by-laws" (R. 22). While the Board of Directors has recommended and the members of the Association have authorized deductions in excess of 1¢ per gallon (R. 27) and such deductions have been as high as 4¢ per gallon and as low as ⅓ of a cent per gallon (R. 107), it appears that such deductions are now made at the rate of 1¢ per gallon (R. 87, 88, 91, 100, 107).

(2) The Association purchases milk and cream from sources other than its members and resells such milk and cream at a profit (R. 105, 106, 120, 136).

(3) The Association derives profits or losses from the sale of securities (R. 106, 117, 131).

(4) The Association receives interest and dividends from investments (R. 106, 131).

(5) The contract between the Association and its members provides that if the member fails to deliver his milk or cream as directed by the Association, he will pay the Association, as liquidated damages, 5¢ per gallon for all milk, and 20¢ per gallon for all cream, so withheld (R. 25). Such defaulting member may also lose all right to any equity he may have in the Reserve Fund or other property of the Association (R. 41). It appears, however, that the Association has derived no income from this source (R. 105, and 106).

Witnesses for the Association made frequent reference to a "Reserve Fund" or "Revolving Fund" and the arguments of both petitioner and *amicus curiae* apparently assume that the intangible tax has been levied upon such "Fund". Apparent-

ly such references are to the net worth of the Association. No mention is found in the by-laws or contracts of the Association of a "Revolving Fund". Paragraph (g) of the by-laws refers to a "reserve fund" but any such fund is nowhere defined. If any such fund exists, it would appear to have no official status and the purpose thereof and the property contained therein has not been satisfactorily described.

Although the Association has paid dividends annually since 1934 (R. 112), such payments are within the sole discretion of the Board of Directors (R. 40, 103, 113). The members have no more right to demand and receive a dividend or distribution than the stockholders of any corporation. The by-laws of the Association require that any division or distribution of the surplus shall be "on the basis of the value of milk delivered" by the members under their marketing agreements. It appears that the Board of Directors has followed a practice of making distribution on the basis of the proportionate value of each member's milk delivered during the sixth year prior to the year in which such distribution is made (R. 101, 102). Petitioner's argument that these distributions are merely a return of the amount which each individual member contributed to the Association's surplus in the sixth year prior to such distribution is obviously without merit. If there is a loss for one particular year that is shared by the entire "Revolving Fund" rather than by that particular year's fund (R. 90, 102). Any relation between the amount distributed in any year and the amount added to the Association's surplus in the sixth year prior to such distribution is purely accidental. For example, distributions were made on November 1, 1935 (R. 112), although the Association suffered substantial losses in 1929 (the sixth year prior to such distribution) (R. 91, 123). No record is kept of the profit or loss derived from the amount added to surplus in any particular year. Losses are not deducted from the surplus of any particular year but are deducted from the entire assets of the Association (R. 91, 102,

123). The annual distributions to members have no direct relation to what the contributions of members for any particular year may have earned (R. 118). Since the Association has no stock, dividends or distributions of surplus must be made on some other basis, hence the provision for distribution on the basis of the value of milk delivered by the individual members (R. 40). The Association's surplus is accumulated in the same manner as the surplus of other corporations, and is the property of the Association to the same extent.

Petitioner's argument respecting ownership of the property in question is based upon the statement of the facts in the petition for writ of certiorari (p. 7) regarding such ownership, which statement is, in large degree, merely a series of quotations of statements of conclusions by petitioner's witnesses which are unsupported by the record. Counsel for *amicus curiae* likewise adopts these erroneous conclusions (*amicus curiae* brief p. 4) and its argument respecting the material issues here involved is based thereon.

Accounts Receivable

Petitioner also contends that "Accounts Receivable from Dealers" included in the tax base for each of the three years were not assets of the Association. The petitioner contends that the Association was not the owner of milk delivered to distributors and that such Accounts Receivable were due the producers or members and that the Association was merely acting as agent for its members in the collection of such accounts.

Under the contract entered into between the Association and the individual producers (R. 20-28) the producer agrees to deliver or have delivered by such carrier or carriers as the Association may designate all milk or cream produced on all farms owned or operated by the producer (except such milk or cream as is required for home and farm consumption) to such shipping stations, plants, or other consumer as may be designated

from time to time by the Association. The Association agrees to dispose of the producer's milk and cream and guarantees payment to the producer for the milk and cream delivered (R. 26, 110).

Under contracts between the Association and milk distributors in the District, the distributor agrees to buy its entire supply of fluid milk and cream from the Association and agrees to pay the Association for all milk delivered to it by the Association or its members (R. 136-139). The Association agrees to furnish the distributor a certain quantity of milk produced by its members in accordance with the regulations of the District of Columbia Health Department and then directs the members to whom to make delivery of their milk (R. 98).

When the milk of any producer is delivered to a distributor it loses its identity (R. 108, 109, 126) and such producer has no claim to any particular part of the receipts from such milk (R. 92). The amount which the Association pays a producer for milk he has delivered during any month is determined by a more or less arbitrary formula and has no direct relation to the manner in which his milk is disposed of by the distributor or the price which the Association receives for the particular milk which he has delivered (R. 92, 93, 95, 108, 109, 124, 126).

The total receipts of the Association from the sale of milk to distributors and cream to ice cream manufacturers, etc., are pooled. The member producers have no claim to any portion of such funds (R. 92) but merely a claim against the Association for amounts due the respective producers for milk delivered under their individual contracts with the Association.

Most producers were paid two prices for their milk. By use of a formula based upon the producer's deliveries during the months of October, November, and December (R. 92, 94 and 95), a portion of his milk was allotted to "fluid consumption" for which he received the "Class One" price. Apparently, the portion of the producer's milk for which he received the "fluid consumption" or "Class One" price was supposed to have some

theoretical relation to the percentage of the total milk sold by the Association which was used by the Distributors for fluid consumption. For the remaining portion of such milk, the producers were paid by the Association the "Class Two" or "surplus" price which was a relatively much lower price. The producers were paid according to this formula, regardless of the fact that all of their milk may have been used for fluid consumption or that none of it may have been so used (R. 93, 109, 110, 124, 126).

All producers were not paid in accordance with such formula (R. 94, 95, 96, 97). In the case of new members coming into the Association after November 1 of any year, the Association allowed them to select one of two other plans: (1) the Association agreed to purchase their milk for 1¢ per gallon under the weighted average price of milk from month to month, or (2) would pay them in accordance with the formula which allotted 50% (or 55%) to "Class One" or "fluid consumption" and the remaining 50% (or 45%) to "Class Two" or "surplus" (R. 94, 96, 125). It also appears that prior to September 1, 1936, the method of payment was based, to some extent, upon seniority (R. 94, 127).

The distributor's only obligation in connection with payment for milk delivered under its contract with the Association was to the Association and not to the producers. It seems plain that the "Accounts Receivable from Dealers" were due only to the Association and were the property of the Association.

In addition to the principle announced in the case of *Wheeling Steel Corp.* v. *Fox, supra*, the tax assessed against the corporation upon its Accounts Receivable can be supported on the ground that such Accounts Receivable had acquired a "business situs" in the District.

New Orleans v. *Stempel*, 175 U.S. 309, 44 L. Ed. 174;

Bristol v. *Washington County*, 177 U.S. 133, 44 L. Ed. 701;

State Board of Assessors v. *Comptoir National D'Escompte*, 191 U.S. 388, 48 L. Ed. 232;

Metropolitan L. Ins. Co. v. *New Orleans*, 205 U.S. 395, 51 L. Ed. 853;

Liverpool Etc. Ins. Co. v. *Orleans Assessors*, 221 U.S. 346, 55 L. Ed. 762;

N. Y. Ex Rel. Whitney v. *Graves*, 299 U.S. 366.

Such Accounts Receivable arose out of, and were necessarily used as an integral part of, the business of the Association carried on in the District of Columbia.

(b) Business Privilege Taxes

Section 5, Title VI, of the District of Columbia Revenue Act of 1937 (50 Stat. 690), Sec. 970, Title 20, D. C. Code, 1929, Supplement III, provides, in part, as follows:

> "For the privilege of engaging in business in the District of Columbia, each person so engaged shall pay to the collector of taxes of the District of Columbia for the fiscal year 1937-1938 a tax equal to two-fifths of 1 per centum of the gross receipts in excess of $2,000 derived from such business for the calendar year 1936: *Provided, however*, That the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

"Business" is defined in Section 1(d) of said Title VI as follows:

> "The term 'business' shall include the carrying on or exercising for gain or economic benefit, either direct or indirect, any trade, business, profession, vocation, or commercial activity in or on privately owned property and in or on property owned by the United

> States Government in the District of Columbia, not including, however, labor or services rendered by any individual as an employee for wages, salary, or commission."

And in Section 1(e) of said title the term "gross receipts" is defined to mean:

> "* * the gross receipts received from any business in the District of Columbia, including cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor, or services or other costs, interest, or discount paid, or any other expenses whatsoever * * *."

There would appear to be no question that petitioner was engaged in business in the District of Columbia within the meaning of Title VI.

Hazen v. *National Rifle Ass'n of America, supra;*
Army & Navy Club v. *Dist. of Columbia*, 8 App. D.C. 544;
District Grocery Stores, Inc., v. *District of Columbia, supra.*

On October 6, 1937, the Association filed a business privilege tax return with the Assessor, D. C., reporting gross receipts for the calendar year 1936 in the amount of $124,815.59, representing sales of milk and cream purchased from persons other than its members and resold by the Association (R. 133, 134). The taxes computed upon such receipts were paid by the Association without protest. The report of the accountant of the Association furnished the Board of Tax Appeals discloses that only $39,423.43 of the total amount reported in its return was received from sales of milk and cream purchased from persons other than its members and resold in the District (R. 121); the Board used this latter figure and the Association apparently concedes its liability to taxation upon such receipts.

The Association, however, objects to payment of a tax measured upon the gross receipts from milk and cream produced by its members which was sold by the Association and delivered to distributors located in the District during the calendar year 1936. Petitioner's argument in this respect is similar to that advanced in connection with its objections to taxation of "Accounts Receivable from Dealers", namely, that it was not the owner of the milk and cream sold and delivered to local distributors but was merely the agent for its member producers in such transactions, and sales to the distributors were made by the producers and not by the Association. Under the petitioner's theory, only its gross commissions from such sales and not the gross receipts therefrom would be included in the business privilege tax base.

The Association has two classes of contracts with distributors (R. 130): (1) where the distributor purchases his entire milk supply from the Association, he pays the Association for that milk only that is sold by him for fluid consumption of his customers, and he is allowed to return to the Association, without pay therefor, the surplus milk not needed by him for fluid consumption. He is required, however, to reduce such surplus to cream, in payment for which process he retains the skim milk, whey, and other by-products. The cream resulting from such operation is sold by the Association to ice cream manufacturers and other concerns at a price which produces a return to the Association for such surplus greatly less than the price received for milk destined for fluid consumption (R. 92); (2) where the distributor does not purchase his entire milk supply but only a part thereof from the Association, such distributor is required to pay for all milk delivered to him at fluid milk consumption prices (R. 130). Apparently, the prices charged this latter class of distributors are not uniform (R. 130). These agreements regarding prices are made by the Association and the distributors without consulting the producers (R. 113).

The Association does not pay the producers the price received from the distributors for the milk produced by each producer less a commission or "brokerage". The Association pays the individual producer, and the amount so paid has no direct relation to the use of the individual producer's milk or the price which the Association receives from the distributor for such milk (see Part III (a) of this brief). The Association guarantees that the producer will receive payment for his milk whether the distributor pays the Association or not (R. 110), and can require specific performance of the contract (R. 25). Under the terms of the agreements between the Association and the producers, the latter agree to deliver to such point or points as the Association shall direct and the Association agrees to pay for all the milk produced by the producers and not needed for their personal use. When the milk is delivered to the distributor, title passes from the producer. If the milk is not sold by the distributor it is returned to the Association and the individual producer has no direct interest in, or responsibility for, its disposition by the Association or the price received therefor by the Association. It seems plain that the agreement between the Association and the producers creates a contract of sale, and that the relation between the Association and the producers is that of debtor and creditor.

In re Rabenau (D.C., 1902), 118 Fed. 471, 475;

Texas Farm Bureau Cotton Assn. v. *Stovall*, 113 Tex. 273, 253 S.W. 1101, 1107;

Neith Coop. Dairy Products Assn. v. *National C. P. Federation*, 217 Wisc. 202, 257 N.W. 624, 98 A.L.R. 1403;

Arbuckle v. *Kirkpatrick*, 98 Tenn. 221, 39 S.W. 3, 36 L.R.A. 285;

Arbuckle v. *Gates*, 95 Va. 802, 30 S.E. 496;

23 R. C. L. 1218, and cases cited.

The Board of Tax Appeals determined that the relation between the Association and the producers is that of debtor and creditor, and that the agreement between them creates a con-

tract of sale by the producers to the Association. The Court of Appeals sustained the Board's findings of facts. These concurrent findings are supported by the evidence and should be accepted by this Court. *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 182.

(c) Validity of Assessments

Questions regarding the validity of assessments of personal property and business privilege taxes against the petitioner were first raised before the Court of Appeals. The Court held it was not required to consider such questions but was free to do so (R. 158). The Court properly held that the assessments were clearly authorized by the statutes (R. 159-160). *Sturges* v. *Carter*, 114 U.S. 511.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
GLENN SIMMON,
Assistant Corporation Counsel, D. C.,
Attorneys for the Respondent.